able goods on import or export" and "goods of a class dutiable on import or export". One need only to consider the mischief that the Legislature intended to cure by the amendment to ascertain the true meaning of those words. All the Legislature wished to prevent was the evasion of customs duties when goods were in fact imported into or exported out of Malaysia. If indeed the said goods were on transit then, unless the said goods were expressly exempted, permission of the relevant authority was required. Nothing is simpler than to convey goods in a "local craft" for that purpose. Thus, if in fact the local craft was in transit then it is encumbent on the consignor or consignee of such class of goods to obtain written permission of the relevant authority. In this case the goods were not even accompanied by any manifest or other documents let alone being permitted by the authority to be conveyed in a local craft in Territorial Waters. In the circumstances, should the defence that the vessel was on transit be available, it would render the provisions of section 49(1) of the Act nugatory and ineffective as a means to cure the intended mischief.

In my view even if the vessel was in transit, it is obligatory on the consignor or consignee of the goods to obtain written permission of the Director-General of Customs where the vessel were to pass through Malaysian Territorial Waters. Failure to obtain such written permission would expose the person responsible for the vessel to a charge under section 49(1) of the Act.

It was further submitted on behalf of the appellant that since the appellant did not know that he was in Malaysian Territorial Waters, he had a good defence for a charge under section 49(1) of the Act. On reading the provisions of section 49(1), I was of the view that the offence thereunder created is a strict liability offence, the commission of which requires no guilty intention or knowledge. Not only the words "knowingly", "intentionally" or "wilfully" are not used in section 49(1) of the Act, the effect of the said section would be nullified if a court were to interpret the provisions as being otherwise than strict liability offence.

In the circumstances it was no defence for the appellant to contend that he did not know that he was in Territorial Waters of Malaysia at that material time and place.

As stated earlier I allowed the appeal against the conviction and sentence under section 135(1)(e) of the Customs Act as to my mind the facts disclosed had not established that such an offence had been committed. In the lower court the appellant was charged for "knowingly concerned in conveying dutiable goods ... such goods being dutiable on export under the Customs Duties Order, 1978 (P.U.(A) 393/77) with intent to defraud the Government of the duties thereon..." On the authority of *Ng Kim Huat, supra,* the prosecution had failed to prove that the goods conveyed in the "local craft" were "dutiable goods" since the prosecution had failed to prove that such goods were indeed exported out of Malaysia. On this ground alone the appellant should succeed and I accordingly set aside the conviction and sentence on the charge under section 135(1)(e) of the Act.

The learned Magistrate in the lower court ordered that the "local craft", the tin ore and the tin slag be forfeited. Such forfeiture order was upheld and confirmed. Under section 127(1) of the Act

> "An order for forfeiture ... of anything liable to forfeiture ... shall be made by the court ... if it is proved ... that an offence against this Act ... has been committed and that the goods were the subject matter of or were used in the commission of the offence...."

In the instant appeal an offence under section 49(1) of the Act had been committed and proved. The tin ore and tin slag were proved to be "goods of a class dutiable on import or export" and were the subject-matter of the charge. Such goods were conveyed in the "local craft" seized by the customs. In the circumstances, the order for forfeiture of the "local craft", tin ore and tin slag was made in accordance with section 127(1) of the Act.

The appeal against the forfeiture of the goods was also dismissed.

Order accordingly.

Solicitors: *R.K. Menon.*

DIAMOND PEAK SDN. BHD. & ANOR. v. D.R. TWEEDIE

[O.C.J. (Gunn Chit Tuan J.)
March 23 & 24, July 14, 20 & 29, 1981]

[Penang — Civil Suit No. 362 of 1978]

Land Law — Sale and purchase agreement — Correspondence — "The technical details I leave to my lawyers" — Whether binding.

The plaintiffs claimed specific performance of an oral agreement whereby the defendant had agreed to sell the 2nd plaintiff his land on certain terms. Alternatively the plaintiffs claimed specific performance of an agreement embodied in an exchange of letters culminating with a letter from the defendant who wrote that he was delighted that it was the plaintiff who was buying the land and that "the technical details" he would leave to his lawyers. In the further alternative the plaintiffs claimed a contract as set out in an engrossed agreement sent by the plaintiffs' solicitors to the defendant's solicitors on March 13, 1978.

Held: (1) that on a balance of probabilities the plaintiffs had established an oral contract as claimed;

(2) alternatively that there was a completed agreement sent out in the 4 copies of agreement of sale which had been sent by the plaintiffs' solicitors to the defendant's solicitors together with their letter of March 13, 1978;

(3) the facts of this case did not support the inference that the parties intended to be bound only when a formal agreement had been executed.

Cases referred to:-

(1) *Hussey* v. *Horne-Payne* (1878-9) A.C. 311.
(2) *May* v. *Thomson* (1882) 20 Ch. D. 705.
(3) *Bristol etc. Aerated Bread Co.* v. *Maggs* (1890) 44 Ch. D. 616.
(4) *Clifton* v. *Palumbo* [1944] 2 All E.R. 497.
(5) *Lockett* v. *Norman Wright* [1925] 1 Ch. 56, 62.
(6) *Winn* v. *Bull* (1877-78) 7 Ch. D. 29, 32.
(7) *Eccles* v. *Bryant* [1948] Ch. 93, 97.
(8) *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284, 288-289.
(9) *Bolton Partners* v. *Lambert* (1889) 41 Ch. D. 295, 298.
(10) *Cranleigh Precision Engineering Ltd.* v. *Bryant* [1965] 1 W.L.R. 1293.

(11) *Oxford* v. *Provand* (1867-9) 2 P.C. 135, 147.
(12) *Cavallari* v. *Premier Refrigeration Co. Pty. Ltd.* (1952) 85 C.L.R. 20, 25.
(13) *Eadie* v. *Addison* (1883) 52 L.J. Ch. 80, 82.
(14) *Perry* v. *Suffields* [1916] 2 Ch. 187.
(15) *Bellamy* v. *Debenham* (1890) 45 Ch. D. 481, 493-495.
(16) *Cayley* v. *Walpole* (1870) 39 L.J. Ch. 609, 617-18.
(17) *Bonnewell* v. *Jenkins* (1878) 8 Ch. D. 70.
(18) *Rossiter* v. *Miller* (1878) 3 App. Cases 1124, 1151, 1152.
(19) *Ives Investments Limited* v. *High* [1967] 1 All E.R. 504, 509.
(20) *North* v. *Percival* [1898] 2 Ch. 128, 132-33.
(21) *Shankar Lal Narayan Das* v. *The New Mofussil Co. Ltd.* A.I.R. 1946 P.C. 97.
(22) *Branca* v. *Cobarro* [1947] K.B. 854.
(23) *Bigg & Anor.* v. *Boyd Gibbins Ltd.* [1971] 2 All E.R. 183.

CIVIL SUIT.

Lim Kean Chye for the plaintiffs.

W.S.W. Davidson for the defendants.

Cur. Adv. Vult.

Gunn Chit Tuan J.: One Doctor D.R. Tweedie (hereinafter referred to as "the defendant"), a medical practitioner and owner of seventeen acres of vacant land at Telok Bahang held under Holding numbers 514, 521, 522 and 528 Mukim 2 South West District, Penang, (hereinafter referred to as "the said land") was making efforts to sell those 17 acres of land towards the end of 1977. One Tan Chong Keat, an architect, (hereinafter referred to as "Tan") was desirous of purchasing the said land and according to him he made an appointment through the defendant's caretaker to meet him one Sunday morning. But according to the defendant, Tan had no appointment to see him and arrived one Sunday morning at about 11.00 a.m. whilst he was staying at a week-end bungalow called "Boa Fe", which is on a piece of land adjoining the said land. According to the defendant "Boa Fe" was sold by him to a Mr. Buchanan some years ago subject to the condition that he could use it for the rest of his life. Nevertheless it was a fact not disputed by the parties that Tan first met the defendant at "Boa Fe" on Sunday December 11, 1977. They had a discussion about the said land and came to what they called "an arrangement". According to Tan the "arrangement" was that the price for the said land was $300,000 to be paid in ten instalments of $30,000 each; vacant possession would be given and the said land transferred to him on payment of the first instalment. The defendant admitted that they did talk about the seventeen acres but said that he might have on December 11, 1977 discussed about transfer of the said land and mortgage back to him but he could not remember. He further said that it was what he called "a 10-year contract" and he did not agree to give possession of the said land on payment of the first instalment. Their conversation lasted only about twenty minutes and they did not talk about other matters. However, as a result of their discussion on December 11, 1977 the defendant wrote the following letter to Tan on December 12, 1977: —

"Dear Mr. Tan,

It was a great pleasure meeting you yesterday at Boa Fe (Portuguese for 'Good Luck') and I hope we meet many times in the future.

The arrangement we came to was good if the present option holders — to sell the 17 acres for $340,000 do not succeed by the time the option expires, January 31, 1978 — you have the right to buy the land for $300,000 payable in $30,000 instalments over 10 years, starting on February 1978. I hope the deal comes off as I would like to have you and your medical relative as neighbours.

With very best wishes,

Yours sincerely,
D. Reid Tweedie"

Nothing further happened until January 30, 1978 when the defendant wrote to Tan again as follows: —

"Dear Mr. Tan Chong Keat,

Yesterday I rang your house number and a lady with a very charming voice said that you were outstation, I had not been to Penang for a month.

I am writing to ask if you are still interested in buying the 17 acres, as per my letter of December 12, 1977. If so, would you please write to me by return, as there are other people wanting an option. As I said in my letter of December 12, 1977 I would prefer that you buy.

Please show the enclosed items to your relatives.

All best wishes for 1978.

Yours sincerely,
Tweedie"

Tan explained in court that he did not reply to the defendant's first letter dated December 12, 1977 because he had to wait for the option, which the defendant had granted to someone else, to expire. He did, however, on receipt of the defendant's second letter dated January 30, 1978 write to him the following letter on February 3, 1978.

"Dear Dr. Tweedie,

Re: *Land — Lot 514, 521, 522 & 538 Mk. 2, S.W.D., Penang*

We refer to your letters of December 12, 1977 and January 30, 1978 regarding the abovementioned property. We agreed to the terms and conditions of your offer and the manner of payment that is —

1. The price is $300,000 for all the abovementioned lots of approximately 17 acres of property at Telok Bahang.
2. Payments will be made in ten (10) instalments. Each instalment of $30,000 will be spread over a period of ten (10) years.
3. Transfer of the property to be made on payment of the first instalment, but let you have our mortgage in return for security.
4. Vacant possession to be given on the first payment of the property.

Our lawyer is Lim Cheng Chuan & Co. of 20-A, Beach Street, Penang. We will instruct him to write to you. We hope that the matter could be finalised soon.

Yours faithfully,
CHONG KEAT SDN. BHD.
Sgd.
Director

c.c. Mr. Lim Cheng Chuan"

According to Tan the terms stated in his above letter dated February 3, 1978 set out the terms which he and the defendant had agreed on December 11, 1977. He also said that he had made a telephone call to the defendant at about the time he wrote his letter of February 3, 1978 to make sure that the defendant did not give an option to other people. It was admitted in paragraphs 7 & 8 of the statement of defence that the defendant did receive a letter from Chong Keat Sdn. Berhad dated February 3, 1978 and that he, the defendant, did write to Tan the following letter on February 6, 1978:

"Dear Mr. Tan Chong Keat,

Thank you so much for your letter of February 3, 1978. As I said before, I am delighted that it is you who is buying the land.

The site is exquisite. The PM's daughter Hania Hussein, when she came to the place with her husband, said, 'The beauty is breath-taking.'

The technical details I will leave to my lawyers, Lewis & Co., Ipoh. The partner who kindly deals with my affairs is W.S.W. Davidson (Bali) whose charming wife is the niece of the Tunku Abdul Rahman, who is a kind friend to me.

I wish you all happiness in the New Year.

Kong Hee Fatt Choy.

Yours sincerely
Tweedie"

Tan was on his way from Penang to Kuala Lumpur on February 9, 1978 when he stopped at the defendant's clinic in Sg. Siput, Perak. As he was not able to meet the defendant that day, he wrote the following note in the defendant's clinic because, as he said, he "wanted to make sure he got my letter of February 3, 1978: —

"Dear Dr. Tweedie,

I called on you at 10 a.m. and wait for you to 11 a.m. You are not in. Perhaps it is still a holiday for you.

I have written to you to confirm the purchase of your land in Telok Bahang. I will be on the way back from Kuala Lumpur on Sunday and most properly will call on you again.

With best regard.

Sgd.
TAN CHONG KEAT
Penang
9/2/1978"

On the instructions of Tan, his solicitors Lim Cheng Chuan and Company wrote the following letter to the defendant on February 18, 1978: —

"Dear Sir,

Lots 514, 421, 522 & 538 Mk. 2, S.W.D. Penang

We are instructed by our client Mr. Tan Chong Keat the intending purchaser to forward herewith a copy of the Sale Agreement for your approval and early return.

Our client has deposited the sum of $30,000 with us.

We shall be obliged if you will send us the title deeds pertaining to the above lots to enable us to prepare the Transfer.

Yours faithfully,
LIM CHENG CHUAN & CO.

c.c. Mr. Tan Chong Keat"

In reply the defendant's solicitors, Lewis & Company, sent the following letter to Tan's solicitors Lim Cheng Chuan and Company on February 22, 1978: —

"Dear Sirs,

Re: *Lots 514, 421, 522 & 538 Mk. 2, S.W.D. Penang*

We refer to your letter to Dr. D.R. Tweedie dated 18/2/1978 and our telephone conversation this morning. Our client is agreeable in principle to the sale to your client on the terms of your draft subject however to the following points:—

(a) Although you pointed out to us that clause 5 of your draft which provides for the first instalment (after the down payment) to be paid on February 1, 1978 was a mistake, our client would like to insist on this so that effectively a down payment of $60,000 will be received. The reason for this is as explained to you on the telephone that there is a sum of approximately $52,000 due by our client to the Hongkong & Shanghai Banking Corporation, Station Road, Ipoh who have a lien on the title deeds and it would of course be necessary for this amount to be paid for out of the down payment to ensure their agreement to the terms of sale. The balance of purchase price of $240,000 could then be paid by 9 equal instalments the first instalment falling due on February 1, 1979 and with the amount of the real property gains tax being advanced by your client and repayable out of the instalment due on February 1, 1979.

(b) As we have advised our client that a charge over the property might give him insufficient protection, our client would like to insist on the personal guarantees of the directors of your client company including specifically Mr. Tan Cheong Keat (whether or not he is a director of the company). Also, we would like to have the usual provision that on default of one instalment after perhaps a 14 day warning letter by registered post, the whole outstanding balance shall immediately become due. We would also be grateful if you could draft the terms of charge which could after agreement be attached as an annexure to the agreement.

We would be grateful if you would take your client's instructions on this point and could then prepare a fresh draft. In the meanwhile, we are forwarding herewith the title deeds to the above properties as per list attached, on your usual undertaking not to part with them until due execution of the agreement of the down payment.

Yours faithfully,
Sgd.

c.c Dr. D.R. Tweedie,
White House,
Sungei Siput.
'Manager,
The Hongkong and Shanghai Banking Corpn.,
Station Road,
Ipoh'."

Here it must be noted that the defendant himself had originally stated in his letter of December 11, 1977 that the instalments should be $30,000 paid over 10 years. But it would appear that his solicitors' letter of February 22, 1978 purported to vary the proposed instalments, after an initial payment of $60,000 to a rather odd figure to be arrived at by dividing the sum of $240,000 by the figure "9". However Tan told the court that he agreed to pay the defendant the sum of $60,000 referred to in paragraph (a) of the letter dated February 22, 1978 from Lewis and Company, although the defendant had never mentioned that there was a sum of approximately $52,000 due by him to the Hongkong & Shanghai Banking Corporation, Ipoh. There was also no previous mention of any requirement of personal guarantees as referred to in paragraph (b) of that letter from the defendant's solicitors. The defendant himself also wrote the following letter to Tan on February 22, 1978 after they had met again at "Boa Fe" the previous Sunday morning i.e. February 19, 1978: —

"Dear Mr. Chong Keat,

It was a great pleasure to have the happy meeting with you on Sunday morning at Boa Fe.

Thank your lawyer for his letter. I left it with Bill Davidson on the Tuesday evening. It arrived in the morning. I am leaving the technical matters to the two lawyers. Bill has a high opinion of your lawyer.

I am desperately hoping that your uncle-in-law, Professor Khoo Ooi Teik, will try his stroke treatment. He could be the man to save the stroke cases (the thrombosis cases) of the world. There is too much talk in the U.K., instead of sitting down to work. Do try to persuade him. One has such thrill when one's cases walk in, smiling and happy.

See you Sunday morning. All best wishes.

Yours sincerely,
Tweedie"

A meeting was arranged presumably by the defendant for Tan to meet the owner of "Boa Fe" that

Sunday, that is February 19, 1978, because the former wanted to negotiate with the Mr. Buchanan referred to above for access to the said land and also for water supply from a small stream in Buchanan's land. The said Mr. Buchanan is now no longer in this country and neither party called him as a witness although it was alleged by Tan, and admitted by the defendant who claimed that it was a joke, that he was introduced to the said Mr. Buchanan as "the new owner of the said piece of land" so that he could discuss with him about access and water supply.

As indicated in the last line of the defendant's letter of February 22, 1978 they i.e. Tan and the defendant, met again at "Boa Fe" on the Sunday morning of February 26, 1978 as a result of which the defendant sent Tan the following post-card dated February 28, 1978: —

"Thank you again for coming along to see Ronald Buchanan and me on Sunday. We greatly enjoyed your visit. I have told Bill Davidson to revert to our original scheme and he has agreed. It will take a few days to re-sort things out. Do write to the Professor about stroke. Looking forward to Dr. Pauline and you coming Boa Fe on 11th March about 8.00 p.m.

All best wishes."

Tan explained in court that their "original scheme" referred to the terms contained in the draft agreement which was forwarded to the defendants' solicitors with his solicitor's letter of February 18, 1978. He spoke to his lawyer Mr. Lim Cheng Chuan about the post-card he had received from the defendant, and his solicitors therefore sent the defendant's solicitors the following letter dated March 13, 1978: —

"Dear Sirs,

Lots 514, 421, 522 and 538

Mukim 2 S.W.D. Penang

We refer to your letter dated February 22, 1978 and your Mr. Davidson's telephone conversation with our Mr. Lim Cheng Chuan informing us that your client has agreed to accept $30,000 deposit instead of $60,000 as stated in your letter.

We enclose herewith four copies of the agreement of sale, four copies of the transfer and four copies of the Charge for your client's execution and return. We enclose herewith our cheque for $30,000 being the deposit and payment to account ot the purchase price. The said sum is sent to you on your undertaking not to part with it until your client has signed the enclosed documents.

The following are the directors of the purchaser company:—

1. Tan Chong Phok (I.C. No: 4366557)
   No. 65 Beach Street, Penang.
2. Tan Chong Kheng (I.C. No: 0285839)
   No. 65 Beach Street, Penang.
3. Tan Chong Keat (I.C. No: 3643663)
   No. 8-G, Jalan Bunga Pudak,

   Tanjung Bungah, Penang.

Please send us the director's guarantee for their execution.

Please acknowledge receipt.

Yours faithfully,

encl."

Mr. Lim Cheng Chuan (PW2), an advocate and solicitor of Lim Cheng Chuan and Company, confirmed that Tan came to see him and told him that he and the defendant had come to a certain arrangement whereby the defendant was prepared to accept $30,000 instead of $60,000 and that additionally the three directors of his company i.e. Tan himself and his two brothers would be guarantors. Mr. Lim also told the court that he then spoke to Mr. Davidson of Lewis & Co. and confirmed the said arrangement and he had also asked Mr. Davidson to confirm that his client would accept $30,000 instead of $60,000. He then forwarded four copies of an agreement of sale to the defendant's solicitors with his firm's above-quoted letter of March 13, 1978 because according to the letter from Lewis and Company dated February 22, 1978, only two points were raised therein and as both those points were settled, he assumed that all the other terms had been agreed upon. No other points were raised by Mr. Davidson in their telephone conversation referred to in the said letter dated March 13, 1978.

In the meantime Tan and his wife, Mrs. Pauline Tan (PW3) had accepted the defendant's invitation to dinner at 'Boa Fe' on March 11, 1978. They were there for two or three hours and discussed about the said land and for the first time they learnt from the defendant that he had what he called "an alternative proposal" to make. That alternative proposal was that some people from the Urban Development Authority (U.D.A.) were interested in the said land and wanted to buy it. The defendant told Tan and his wife that "U.D.A. was a powerful group and he was afraid to offend them". Apparently, U.D.A. wanted the said land for a scheme and was offering $480,000 for it. The defendant wanted to sell the said land to them and offered to pay Tan compensation of $75,000 which Tan refused to accept.

Subsequent to that turn of events, the defendant's solicitors sent the following reply on March 15, 1978 to Tan's solicitors' letter of March 13, 1978: —

"Dear Sirs,

Re: *Lots 514, 421, 522 and 538*
Mukim 2 S.W.D. — Penang

We are in receipt of your letter of March 13, 1978.

With regard to the first paragraph of your letter, our instructions are that your client verbally informed our client that he preferred to 'stick to the original arrangement', which our client understood to be as in his letter of December 12, 1977. This letter only specifies the price ($300,000) and the fact that the payment is to be by 10 yearly instalments. It does not specify that the titles are to be transferred upon payment of the deposit; our client has instructed us that he has never agreed to this unusual arrangement but on the contrary stressed to your client that the technical details should be left to the lawyers to work out.

This condition of your client also involves our client's bankers, who we understand would not be prepared to release their lien unless the full amount due to them is settled.

We are taking up this matter further with our client, but in the meanwhile feel it right to place on record that our client does not agree to transfer title to your client, until full settlement is made.

Unless and until the terms of the agreement have been finally settled, we are instructed not to accept your client's deposit, and your cheque for $30,000 is returned herewith.

Yours faithfully,

c.c. Dr. D.R. Tweedie,
White House, Sungei Siput.
'Manager,
Hongkong and Shanghai Banking Corpn.
Station Road, Ipoh'."

The defendant's solicitors wrote to Tan's solicitors

again the following letters dated April 21, 1978 and May 2, 1978 respectively: —

"Dear Sirs,

Re: *Lots 514, 421, 522 and 538 Mukim 2 S.W.D. — Penang*

We observe that we have had no reply to our letter of March 15, 1978.

We have however discussed the matter further with our client and he confirms that until the full purchase price has been paid the titles will not be transferred into the names of the purchasers.

Our instructions are that unless your clients can suggest some definite terms which are acceptable to our client, our client has no alternative but to withdraw the offer made to your clients.

Please therefore be informed that if we fail to hear from you within one (1) week from date hereof our client shall no longer be bound by his letter of December 12, 1977 to your client or any subsequent arrangements between the parties and the offer to sell the property to your client shall be treated as having been withdrawn.

Yours faithfully,
Sgd."

"Dear Sirs,

Re: *Lots 514, 421, 522 and 538 Mukim 2 S.W.D. — Penang*

We refer to our letter dated April 21, 1978. Since we have not received any reply from you, we have been instructed to treat all negotiations as having been terminated between our respective clients, and we would be grateful if you would return immediately the title deeds forwarded to you with our letter of February 22, 1978.

Yours faithfully,
Sgd."

On May 5, 1978 Tan's solicitors sent the defendant's solicitors the following reply: —

"Dear Sirs,

Re: *Lots 514, 421, 522 and 538 Mukim 2 S.W.D. — Penang*.

We acknowledge receipt of your letter dated April 21, 1978 and May 2, 1978.

We were unable to reply to your letter earlier as Mr. Tan Chong Keat was away for several days and our Mr. Lim Cheng Chuan was on leave.

We are instructed by our clients to inform you that they agree to vary the terms of the sale by amending Clause 4 of the agreement to the effect that the vendor will transfer the property to our clients upon receipt of the full purchase price.

Please amend the agreement accordingly and return them to us duly executed by your client.

Yours faithfully,
LIM CHENG CHUAN & CO."

Correspondence between the parties' solicitors finally ended on May 16, 1978 after the exchange of two more letters which need not be referred to for the issues raised in this case and in the circumstances which have been set out above, the plaintiffs filed an action in the High Court for specific performance against the defendant on June 27, 1978 for the following claims as shown in paragraph 13 of the amended statement of claim: —

"The plaintiffs claim:—

(1) The plaintiffs claim specific performance of the oral agreement made between the 2nd plaintiff and the defendant and described in paragraphs 2, 3, 4 and 5 thereof.

(2) Alternatively specific performance of the agreement embodied in the letters exchanged between the 1st plaintiff and the defendant on February 3, 1978 and February 6, 1978.

(3) In the alternative specific performance of the said agreements as varied by subsequent letters ending with the 2nd plaintiff's solicitors's letter of May 5, 1978.

(3a) In the alternative specific performance of the agreement as set out in the draft sent by the plaintiffs' solicitors to the defendant's solicitors on March 13, 1978.

(4) Further and in the alternative damages for breach of contract.

(5) Further or other relief.

(6) Costs."

Tan appeared to be one whom we in this country call "a Chinese-educated person" and although he elected to give his evidence in English yet his spoken English was rather poor as can be seen from his written English in the above-quoted note which he himself wrote at the defendant's clinic at Sungei Siput on February 9, 1978. Nevertheless, I gained the impression and found that he was speaking the truth when he told the court, after he was referred to his letter dated February 3, 1978, that items 3 and 4 in that letter were matters which he and the defendant had discussed on December 11, 1977. He told the court that he and the defendant had already settled what he called the "vital terms" and frankly admitted during cross-examination that they did not discuss about the money which the defendant owed to his own bank or about the real property gains tax which the defendant had to pay to revenue. He also admitted that they did not discuss details of the mortgage of the said land back to the defendant nor did he and the defendant think about the adequacy of the security, although in his opinion the defendant would be protected because he had sold the said land, which was zoned in 1977 for conservation land and on which one was not allowed to build houses and which was then only worth about $10,000 per acre, at an inflated price of $18,000 per acre.

The defendant was 79 years of age and hard of hearing but looked fairly active and mentally alert. He said that he could not remember whether he did discuss with Tan about the transfer of the said land and mortgage back to him on December 11, 1977, but I considered and found on the balance of probabilities that the parties concerned did talk about those matters because although it was expressly denied in the statement of defence that there was any mention at the meeting on December 11, 1977 of transfer or possession of the said land on payment of the first instalment, yet after the defendant had received Tan's letter of February 3, 1978, he did not in his reply of February 6, 1978 deny any of those matters referred to by Tan in his said letter of February 3, 1978. I therefore did not believe the defendant when he told the court in answer to questions by his own counsel during his examination-in-chief that he only agreed to the first and second term but not to the third and fourth term in that letter of February 3, 1978. When he was referred by his own counsel to his letter of February 6, 1978 and asked what he meant by "technical details" he said that he meant that he "was not going to draw up mortgages". I considered and found that it was improbable that the parties concerned did not on December 11, 1977 talk about the transfer of the said land and mortgage back to the vendor as security if the defendant then already had in mind that one of the technical details to be left to the lawyers was

the preparation of a charge or what he called a "mortgage". He also said that as he was not a lawyer he preferred the experts "to attend to and prepare the instalments and the transfer" about which the parties must, I find on the balance of probabilities, have already discussed.

As regards the plaintiffs' claim in paragraph 13(2) of the amended statement of claim, it was the contention of Mr. Davidson, counsel for the defendant, that the two letters referred to in that paragraph could not constitute a binding contract for various reasons. Firstly, he argued that the letter of February 6, 1978 was not an acceptance and that there could not be a binding contract witnout an unqualified acceptance. He considered that the only words in the letter of February 6, 1978 which could conceivably be construed as an acceptance were the words "I am delighted it is you wno is buying the land" but he argued that those words were only evidence of an expectation that the addressee would be buying the said land and that the use of the present tense ("buying") implied that the process of sale and purchase had not been completed which was reinforced by the words "the technical details I leave to my lawyers". Counsel also stated that in deciding whether the said letter was intended as a formal acceptance, one might look at the degree of formality in tne words used. He pointed out tnat the letter of February 6, 1978 like all the other letters of the defendant were friendly letters containing material extraneous to the matter in hand and that reinforced a conclusion that the defendant regarded legal matters as being the province of lawyers and would not have contemplated a formal binding acceptance particularly in view of the unusual nature of the proposals contained in the letter of February 3, 1978. Counsel also argued that this was not a usual type of transaction and that such an arrangement required more detailed terms and conditions on which the letters concerned are silent in order to protect the vendor. He cited the cases of *Hussey* v. *Horne-Payne,*[1] *May* v. *Thomson*[2] and *Bristol, etc. Aerated Bread Co.* v. *Maggs*[3] and contended that in any case it was necessary to look at the whole of the correspondence between the parties which continued after the letter of February 6, 1978 and that if the letter of February 6, 1978 was at all an acceptance it was a conditional acceptance subject to contract. He also cited the cases of *Clifton* v. *Palumbo*[4] and *Lockett* v. *Norman Wright*[5] and contended that the intention of the words "the technical details I leave to my lawyers" are clear that there was to be no binding agreement between the parties unless and until the arrangements agreed upon are embodied and executed in a formal contract settled by the lawyers.

Counsel also stated that the plaintiffs' claim in paragraph 13(3) of the amended statement of claim could be easily disposed of. He referred to the defendant's solicitors' letter of March 15, 1978 in which he claimed that an important point was raised i.e. that there was to be no transfer of title until final payment. More than five weeks later and having had no response to the earlier letter the defendant's solicitors sent another letter to the plaintiffs' solicitors on April 21, 1978 intimating that after one more week the defendant would no longer be bound by his letter of December 12, 1977 i.e. the original offer of the defendant. Counsel contended that the plaintiffs were given a full and fair opportunity to conclude the negotiations and only after a further eleven days i.e. on May 2, 1978 did Lewis & Co., the defendant's solicitors, terminate all negotiations. Counsel argued that the plaintiffs' acceptance of the new term on May 5, 1978 had come too late and in any case their letter of May 5, 1978 was only sent after receipt by the plaintiffs' solicitors of the letter of May 2, 1978.

With regard to the plaintiffs' claim in paragraph 13(1) of their amended statement of claim counsel for the defendant contended that it was significant that the plaintiffs did not when they filed their writ in June 1978 rely on the oral agreement. It was never relied on in correspondence and was only relied on when the statement of claim was filed on January 24, 1980. He argued that this alternative claim involved the veracity of the witnesses as the failure to rely on the oral agreement casts some doubt on the truth of Tan's evidence. Counsel conceded that it was possible that a binding contract could be made verbally but that the likelihood of this decreased proportionately to the value of the subject matter and the complexity and unusual features of the deal. He contended that the court should consider the inherent unlikelihood of the second plaintiff whom the defendant had never met before, simply turning up and in a short meeting concluding a detailed sale transaction involving transfer on first payment and mortgage back to the vendor. He also stated that there was no corroboration of Tan's evidence with those important terms verbally agreed on at the meeting on December 11, 1977. The defence admitted that the defendant was at that stage envisaging and even hoped that Tan would buy the land but contemplated that legal or technical matters should be worked out by the lawyers before there was a binding contract.

As regards paragraph 13(3a) of the amended statement of claim, it was the contention of counsel for the defendant that taking the correspondence as a whole, any agreement between the parties or their solicitors was subject to signature of a formal contract i.e. was "subject to contract". He cited the well-known cases of *Winn* v. *Bull;*[6] *Eccles* v. *Bryant*[7] and *Von Hatzfeldt-Wildenburg* v. *Alexander*[8] and said that the normal effect of making the agreement "subject to contract" was that the defendant was not bound until he had signed a formal contract. After referring to the various letters in the bundle of documents marked "A" it was the submission of counsel that those letters show that the parties intended that there should be a written agreement. In conclusion counsel submitted that the principles in the authorities cited by him and applied to this case was a complete answer to the plaintiffs' contention that the draft contract submitted with the letter of March 13, 1978 could be taken to reflect the terms already agreed between the parties. He also pointed out that as the "conditions of charge" were only forwarded for the first time with the plaintiffs' solicitors' letter of March 13, 1978 it was difficult to see how it could be said that all the terms have been agreed at that stage or how the defendant's solicitors could be said to have satisfied themselves as to the technical details.

Mr. Lim Kean Chye, counsel for the plaintiffs, agreed that the doctrine laid down by the House of Lords in *Hussey* v. *Horne-Payne*[1] applied in this case, but he referred to a passage in the judgment of Kekewich J. in *Bolton Partners* v. *Lambert*[9] where his Lordship cited *Hussey* v. *Horne-Payne*[1] and said as follows: —

"Where you have a contract in letters or other such like documents, that is to say, not reduced into a document of legal form; you are bound to look, not only at what occurred before — what led up to the contract — but also at what occurred afterwards, with regard to the contract, in order to determine the question whetner there was a completed contract, or whether the parties were in truth only negotiating,"

and stated that the reason for the change in attitude of the defendant was because he had received an offer of $480,000 for the said land from a third party (U.D.A.). Counsel pointed out that following the two cases cited by him such evidence of what occurred after the contract should therefore be taken into account. He argued that the defendant would not have offered the plaintiffs compensation of $70,000 or $75,000 if he had not thought that he was bound by a contract to sell the said land. Counsel also reminded the court to bear in mind when considering *Hussey* v. *Horne-Payne*[1] as well as the other cases cited that the Statute of Frauds was an important element in all those cases. He pointed out that the said statute did not apply in Malaysia and that oral contracts here could be binding. Mr. Lim then submitted that when the evidence of the defendant under cross-examination was considered together with the other evidence there was an oral contract in this case.

Counsel then referred to the following passage on contracts by correspondence appearing on page 140 of Volume 9 of *Halsbury's* Laws of England (4th edn.): —

"262. *Contracts by correspondence.*

If a contract depends on a series of letters or other documents, and it appears from them the drawing up of a formal instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding agreement or whether there is no binding agreement until the instrument has been drawn up. The whole of the correspondence or documents must be considered; and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communication. Moreover two letters which at first sight appear to be an offer and an acceptance will not constitute a contract if it appears from subsequent negotiations that important terms forming part of the contract were omitted from these letters; and the mere fact that the parties think there is a binding contract is not conclusive. But once there has been a definite acceptance of all the terms of an offer and the acceptance was without qualification, further negotiations between the parties cannot, without the consent of both, get rid of the contract which has been made,"

and submitted that the law contained in the above passage was applicable in this case.

On the essential point of the intention of the parties, counsel cited the case of *Cranleigh Precision Engineering Ltd.* v. *Bryant*[10] and urged the court to consider what was the intention of the parties as manifested by the construction of the documents in this case as well as the conduct of the parties which must be taken into account. He stated that if it was considered that the defendant wanted a contract and had in his mind made a contract with the plaintiffs, then the rest were "technical details" and only concerned the manner of carrying out the contract. He contended that the stipulation by the defendant's solicitors that a proper contract must be made was isolated from the other stipulations in point of sequence and referred to the following passage in the judgment of Sir William Erle in the Privy Council case of *Oxford* v. *Provand*[11] in support of his contention that it was only for the defendant's solicitors in this case to express in detail what are the legal and usual provisions: —

"The stipulation for a proper contract is usual where the parties make the agreement in their own language for a transfer of an interest in land in the performance of which technical skill is wanted. The legal adviser chosen by the parties (or in case of suit, the Registrar) has to express in detail what are the legal and usual provisions in such a case in respect of repairs and rates and taxes, and to settle whether the mode of transfer shall be by assignment or underlease."

He also referred to the following passage in the judgment of the High Court of Australia in the case of *Cavallari* v. *Premier Refrigeration Co. Pty. Ltd.*[12]: —

"... while the due course of completion of a contract for the sale of land is a matter of some complexity, involving the doing of a number of things by both parties, it is very well settled that an informal or 'open' contract, not dealing expressly with any of these matters of detail, may be made and be binding. In such a case law and equity fill in the details, so to speak, providing by way of implication for whatever is necessary to effectuate due performance."

As for the question of the charge Mr. Lim quoted the case of *Eadie* v. *Addison*[13] and submitted that here a contract had already been formed and that solicitors were only to carry out details and that what were proper clauses for the proposed charge "would be subject to the jurisdiction of this court as to whether or not the clause objected to was proper or improper". He also pointed out that in fact Messrs. Lewis and Company, the defendant's solicitors, did not in their letter of March 15, 1978 quibble over the terms of the charge at all and that that was never a matter in dispute.

Counsel then submitted that the defendant's subsequent actions were an attempt to vary the contract which he could not do without the consent of the plaintiffs and cited the case of *Perry* v. *Suffields*[14] as well as the judgment of North J. in *Bellamy* v. *Debenham*[15] in support of his submission, and he also contended, citing the case of *Cayley* v. *Walpole*[16] that there was in this case not only an oral contract but also a written contract in which the cardinal points had already been agreed to between the parties.

Mr. Lim also contended that even asking a solicitor to "prepare a contract" might not prevent a contract having already been formed. To support his contention he referred to the case of *Bonnewell* v. *Jenkins*[17] and *Rossiter* v. *Miller*,[18] which were followed in the recent English Court of Appeal case of *Ives Investments Limited* v. *High*[19] and to the judgment of Kekewich J. in *North* v. *Percival*.[20]

When parties negotiate with a view to contracting, as in this case, it could be hard to tell when an offer has been made and accepted. Although counsel for the defendant referred to the defendant's letter of December 11, 1977 as an original offer which he claimed had been withdrawn before final acceptance

by the plaintiffs, yet, with respect, I did not consider that letter to be a firm offer on the part of the defendant to sell the said land. It was not, in my view, until a month later when the defendant wrote his letter of January 30, 1978 to Tan that he made what I considered to be an offer to which Tan replied by his letter of February 3, 1978. However, apart from the correspondence between the parties and their solicitors, having seen and heard the parties give their evidence from the witness box, I believed Tan and found on the balance of probabilities that he had at about the time he wrote his letter of February 3, 1978 to the defendant also telephoned him and had made an oral agreement to buy the said land from him on the terms stated in that letter. Under our law, as in India, an oral contract for the sale of immovable property is valid and enforceable. The mere fact that the parties desired to have that agreement put in writing and drawn up in proper form does not affect validity (see *Shankar Lal Narayan Das* v. *The New Mofussil Co. Ltd.*[21]). I therefore ordered specific performance of the oral agreement made between Tan and the defendant as prayed for in paragraph 13(1) of the amended statement of claim.

Even if it is considered that there was no oral agreement between Tan and the defendant and that the court should not have made the order for specific performance of the oral agreement in favour of Tan, I also considered the other evidence, both oral and documentary, in order to determine whether there was a concluded written agreement between the parties. Firstly, I agreed that in this case it was necessary following the House of Lords' decision in *Hussey* v. *Horne-Payne,*[1] which was quoted by both counsel, as well as *May* v. *Thomson*[2] and *Bristol etc. Aerated Bread Co.* v. *Maggs*[3] to look at the whole of the correspondence between the parties after the letter of February 6, 1978 as well as the course of negotiations in order to determine whether the parties did reach an agreement at any point of time. It was for that reason that I declined to make any order in terms of paragraph 13(2) of the amended statement of claim referred to above.

However, looking at the correspondence between the parties and their solicitors which took place after February 6, 1978 as well as the evidence of what occurred before as well as after March 13, 1978, I considered and found that there was a completed agreement set out in the four copies of the agreement of sale which were sent by the plaintiffs' solicitors to the defendant's solicitors with their letter of March 13, 1978. The parties would appear on the evidence adduced to have continued their negotiations after that point had been reached; but as in the case of *Perry* v. *Suffields*[14] and *Cranleigh etc.* v. *Bryant,*[10] the fact that there was a revival of negotiations between the parties did not, except with the consent of both the parties, affect the existence of the contract so made between them. I agreed with counsel for the plaintiffs that where there is an informal or "open" contract, as in this case, which envisages the subsequent execution of a formal document the legal effect of that prior informal agreement depends on the intention of the parties which the court may, on the authority of cases such as *Rossiter* v. *Miller,*[18] *Branca* v. *Cobarro*[22] and the classic statement of law by Parker J. in *Von Hatzfeldt-Wildenburg* v. *Alexander*[8] etc., find on the construction of the documents as well as on the evidence relating to the conduct of the parties. I could not agree with the contention of counsel for the defendant that the use of the words "the technical details I leave to my lawyers" are by themselves clear that the intention was that there was to be no binding agreement between the parties unless and until a formal contract had been executed. I also did not agree with Mr. Davidson, counsel for the defendant, and did not find this case to be or similar to one of the "subject to contract" agreements for the sale of a piece of land. With respect, therefore, I did not think that any of the "subject to contract" cases such as *Winn* v. *Bull*[6] and *Eccles* v. *Bryant*[7] which were cited by him were applicable to the facts of this case. It is indisputable here that the parties did not indicate their intention not to be bound until a formal agreement had been drawn up by their solicitors by expressly making their agreement "subject to contract". It is true, as also contended by counsel for the defendant, that even where the phrase "subject to contract" is not used, similar expressions may be used and inference may be drawn from the whole of the correspondence and conduct of the parties that it was intended that an agreement should come within the "subject to contract" principle. Thus in *Clifton* v. *Palumbo,*[4] which was relied on by Mr. Davidson, the plaintiff and the defendant were negotiating for the sale of a larger scattered estate. The plaintiff wrote to the defendant as follows: —

> "I . . . am prepared to offer you or your nominee my Lytham estate for £600,000. . . I also agree that a reasonable and sufficient time shall be granted to you for the examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion,"

and the U.K. Court of Appeal held that in the circumstances of that case that letter was not a definite offer to sell, but a preliminary statement as to price, which especially in a transaction of such magnitude was but one of the many questions to be considered. It also held that the words or expression "the Schedule of Completion" referred to a purchase contract by which the parties were, for the first time, to become bound. Nevertheless it would not be out of place here to quote the following words of Lord Greene M.R. in that case: —

> "There is nothing in the world to prevent an owner of an estate of this kind contracting to sell it to a purchaser, who is prepared to spend so large a sum of money, on terms written out on a half sheet of note paper of the most informal description and even, if he likes, on unfavourable conditions. But I think it is legitimate, in approaching the construction of a document of this kind, containing phrases and expressions of doubtful significance, to bear in mind that the probability of parties entering into so large a transaction, and finally binding themselves to a contract of this description couched in such terms, is remote. If they have done it, they have done it, however unwise and however unbusinesslike it may be. The question is, Have they done it?"

In this case the same question could also be asked and I would answer it in the affirmative. Unlike the case of *Clifton* v. *Palumbo,*[4] the parties did not use the phrase "subject to contract" or other similar expression and I found that there was here an offer by

the defendant in his letter of January 30, 1978 to sell the said land which was accepted by Tan. The evidence of what transpired before and after the letter of February 6, 1978 showed that the parties had agreed, amongst other things, on the price and had by March 13, 1978 made a contract set out in the agreement of sale sent by the plaintiffs' solicitors to the defendant's solicitors that day. Indeed, by that date all the material terms of the contract had been agreed upon and the case of *Clifton* v. *Palumbo*,[4] where even the price had not yet been determined by the parties, can on that ground alone be distinguished.

The facts of this case are therefore different from those in *Clifton* v. *Palumbo*[4] and are rather more similar to another recent U.K. Court of Appeal case of *Bigg & Anor.* v. *Boyd Gibbins Ltd.*[23] In that case the plaintiffs and defendants were negotiating for the sale of certain property belonging to the plaintiffs. The plaintiffs wrote to the defendants stating: 'As you are aware that I paid £25,000 for this property, your offer of £20,000 would appear to be at least a little optimistic. For a quick sale I would accept £26,000...'. In reply the defendants wrote: '... I accept your offer...' and asked the plaintiffs to contact the defendants' solicitors. In their final letter the plaintiffs said: 'I am putting the matter in the hands of my solicitors ... My wife and I are both pleased that you are purchasing the property.' The plaintiffs alleged that this exchange of letters constituted an agreement for the sale of the property and brought an action for specific performance. The U.K. Court of Appeal, distinguishing *Clifton* v. *Palumbo*[4] held in that case that although an agreement on price did not necessarily mean an agreement for sale and purchase, and the word 'offer' did not always mean offer in the sense of offer for actual sale but might be related to a particular term of the agreement whilst other negotiations in respect of the agreement continued, it was clear from the terms of the letters that the plaintiffs' first letter constituted an offer the acceptance of which by the defendants constituted a binding agreement; accordingly the plaintiffs in that case were entitled to specific performance. Similarly, in this case, I found on the evidence, both oral and documentary, that there was an offer by the defendant and a definite acceptance by the plaintiffs constituting a binding agreement. Therefore, also bearing in mind the warnings of Lord Greene M.R. in *Clifton* v. *Palumbo*,[4] and having read all the letters between the parties and their solicitors I too, like Russell L.J. in *Bigg & Anor.* v. *Boyd Gibbons Ltd.*[23] could not "escape the view that the parties would regard themselves ... as having struck a bargain for the sale and purchase of the property". The facts of this case also did not support any inference that the parties intended to be bound only when a formal agreement had been executed, and the use of the words "the technical details I leave to my lawyers" were in my judgment and I so found, to use the oft-quoted words of Parker J. in *Von Hatzfeldt-Wildenburg* v. *Alexander*,[8] "a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through". In all the circumstances of this case, I therefore made a further order in favour of the first plaintiff for specific performance of the agreement as set out in the draft sent by the plaintiffs' solicitors to the defendant's solicitors on March 13, 1978. Costs were also ordered by me in favour of both plaintiffs.

Claim allowed.

Solicitors: *Lim Kean Chye & Co.; Lewis & Co.*

ONG GUAN TECK & ORS. v. HIJJAS

[O.C.J. (Hashim Yeop A. Sani J.) October 5, 1981]
[Kuala Lumpur — Originating Motion A 31 of 1981]

Practice and Procedure — Limitation — When Court will extend period — Scope of Rules of High Court 1980, O. 69(4)(1).

Arbitration — Award — Circumstances in which Court will interfere — Arbitration Act, 1952, ss. 23 & 24.

The applicants sought to have the period of six weeks limited by O. 69(4)(1) of the Rules of the High Court 1980 for an application to remit an award under section 23 of the Arbitration Act, 1952 extended on the following grounds:— that there was a divergence of opinion on the interpretation of the award between the parties and that the applicants only realised this on June 23, 1981. Only after this realization did the applicants feel that there was "genuine doubt" in their minds whether the various amounts paid by them had been taken into account by the arbitrator in his award.

The award was made and published on April 2, 1981. The applicants filed the Notice of Originating Motion for extension of time on September 16, 1981.

Held, dismissing the application: (1) the court has an unfettered discretion to grant or refuse an extension of time;

(2) the rules of court must *prima facie* be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules of limitation of period;

(3) in considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the court exercising the discretion; On the facts of the present case there was not any valid ground for the delay and therefore application for extension of time must be refused;

(4) the court may set aside an award if the award is bad on the face of it; that there has been misconduct on the part of the arbitrator; if there has been an admitted mistake and the arbitrator asks that the matter be remitted; where additional evidence has been discovered after the making of the award; or where the award is ambiguous, confusing and unclear. In the present case there was nothing ambiguous or confusing or uncertain in the language of the arbitrator.

Cases referred to:-

(1) *Hodgkinson* v. *Fernie & Anor.* 140 E.R. 712.

(2) *Montgomery Jones Co.* v. *Liebenthal & Co.* (1898) 78 L.T. 406; Digest 456, 1036.

(3) *Margulies Brothers Ltd.* v. *Dafnis Thomaides & Co. Ltd.* [1958] 1 W.L.R. 398; [1958] 1 All E.R. 777.

ORIGINATING MOTION.

I. de Silva for the applicants.

K. Thayalan for the respondents.

Hashim Yeop A. Sani J.: The amended Notice of Originating Motion sought to have the period of 6 weeks limited by Order 69(4)(1) of the Rules of the High Court 1980 for an application to remit an award under section 23 of the Arbitration Court, 1952 ex-